

In Praise of Yale Kamisar

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It is an honor to be asked to contribute a few words in praise of Professor Yale Kamisar on the occasion of his retirement from the University of Michigan Law School, where he spent four glorious decades contributing in myriad ways to his students, the University, and to the nation. I have been fortunate to be both a close observer and a personal beneficiary of Yale and his work, and I owe him a large, multi-faceted debt, as do many of his former students on whose behalf he has been indefatigable. The legal academy and even more generally the nation do, as well. Yale has had a remarkable impact on both, although as one moves up the conceptual ladder from the intensely personal to the realm of politics, scholarship, and ideas, the ledger becomes more difficult to appraise. What is unmistakable, though, is that he is a man who made a difference. The nature, scope, direction of that difference will be debated for decades to come. I can imagine no higher praise of a law professor.

In 1977, Professor Kamisar wrote a touching tribute on the retirement of Professor Fred E. Inbau, one of my predecessors in the Wigmore chair, and one of the main foils in opposition to which Kamisar forged his phenomenal career.¹ It is difficult to imagine two individuals with more opposing points of view on a large range of issues. Kamisar concluded his essay, in what was meant as very high praise indeed, by commenting, “[a]lthough I happen to think that most of Inbau’s ideas deserve to be rejected, he nevertheless furthered, or should have furthered, the thinking of all of us.”² The irony is that now Fred Inbau’s ideas are in the ascendancy, have been since that fateful day in 1968 that the *Terry*³ decision came down, and in my opinion deserve to be for the most part. Equally there is no question that Kamisar’s work “has furthered the thinking of all of us,” and he has left an indelible mark on individuals, institutions, and the country.

In what follows, I praise and at points critique these various aspects of his career. It is the mark of the man that Professor Kamisar would expect nothing less. Were I to write a piece of flattering puffery, he would soon be on the phone, yelling in my ear, “Ron, this is nothing but b.s.!” That would be the message, in any event, although it could very well take anywhere from ten minutes to half an

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¹ Yale Kamisar, *Fred E. Inbau: “The Importance of Being Guilty”*, 68 J. CRIM. L. & CRIMINOLOGY 182 (1977).

² *Id.* at 196.

³ *Terry v. Ohio*, 392 U.S. 1 (1968).

hour to be communicated, as he ran through various colorful permutations on the theme. No, what he would expect is precisely what comes through in his encomium to Inbau; he would expect the truth as I see it, and settle for no less. The truth is that I admire Yale beyond measure, believe myself fortunate to have called him first a teacher and then a friend for three decades, have been educated and inspired by his work, am astonished by the impact he has had, but have some doubts about its staying power.

First, the personal. While by the end of this paper Professor Kamisar may not wish to take any responsibility, he was critical to introducing me to the splendors of the law, to the depth and significance of ideas, and to my pursuing an academic career, for all of which I owe him an unpayable debt of gratitude. Having decided not to pursue a Ph.D. in mathematics, I came to law school purely out of a sense of curiosity and exploration, and I had little idea what law school entailed when I showed up in Ann Arbor in the fall of 1970. Like present day students, I thought I would learn “the law,” which I suspect I thought of as lists of legal obligations and rights, and so on.

And then I read the first assignment in Criminal Law, offered by Professor Yale Kamisar. It was a collection of excerpts from across the range of human thought bearing on, as the assignment was modestly titled, “The Meaning, Purpose and Effectiveness of the Criminal Law.” I remember the first two excerpts vividly, one from Kant’s *Philosophy of Law*, discussing the penal law as a categorical imperative, followed by its polar opposite from Holmes’ *The Common Law*, arguing that the law must correspond with the interests and demands of the community, regardless of their merits. Given these readings, which also included selections from Salmond, Darrow, Cardozo, Cohen, Wechsler, and others, if memory serves, I expected the as yet unknown Prof. Kamisar to be an understated philosophical type, but the next day at the first class into the room swept—there is no other word for what Yale does when he enters a classroom—this whirlwind—again there is no other word—of a man. He mounted the podium, glared down at a class roster, looked up and said (“said” might not be exactly the right word), “All right. Mr. Smith, where is Mr. Smith? Mr. Smith, did you read the assignment for today?” And off we went into a fascinating week of arguments between Yale and the class over what still strikes me as the richest single set of readings I have ever done; and even if I romanticize my early experiences as a law student, each day I had the sense that my brain was being overwhelmed with more thoughts than my head could contain. Law school was not what I thought it was going to be, there didn’t appear to be any lists of anything, it bore no relationship (or so I then thought) to the calm precision of the mathematical world I had left behind, and I was well on my way to being hooked.

The hook was soon embedded deeply. Yale’s class had begun to introduce me to the riches of the legal system, to the richness of its intellectual foundations, and to this other classes were contributing as well. And it just kept getting better. The second chapter in our materials examined the relationship between starving

people eating each other and the law,⁴ whether the law could influence such behavior, should it try, or was Kant right that it didn't matter, and so on. At first, this was more of the same, but then events took a different turn. Yale had provoked—again, clearly the correct term—a debate over how, if someone was to die, the selection should be made, and one of my classmates, not surprisingly, defended a commitment to equality above all else. Yale: “What if there is space for one more person on a life boat, and the choice was between Einstein or Salk and some convicted felon?” The student stood his ground, thinking he had safe harbor in Kant's admonition that no person can be made an instrument of someone else, to be literally sacrificed for the good of another. The longest line of luminaries (on the one hand, and cads and scoundrels on the other) you might imagine couldn't shake the young philosopher from his ground. “All right!” the Professor, I would say “yelled,” “what if there is room for three hundred pounds more on the lifeboat, and there are three people left to save, one of whom weighs 300 pounds and the other two each weigh 150 pounds. What are you going to do now? Come on, what now?” At that moment, I understood the meaning of “epiphany.” I thought that I had a good grounding in what “equality” means. I certainly had an adequate understanding of its formal use in mathematics, and in a blinding instant I saw that my understanding was pretty useless if not meaningless to the law. By then, for weeks the class, being first year law students, had been having raging arguments with the demand for “equality” frequently trotted out. And it was all meaningless. Equality could answer no question of its own accord; one needed substantive arguments to fill in the quantities to which equal relations were going to apply.⁵ We, society, somebody, were going to have to go back and start talking about Einstein and convicts, Da Vinci versus Hitler, or as Yale put it, “I want the selection to be made on the basis of debating skill!”⁶ This was not simply interesting; entirely new avenues of thought, new concepts, new perspectives were being exposed. As I say, the hook sunk deeply, and in no small measure it was because of the good fortune of being in his class.

This was not only interesting but fun, and I wanted more of it, the path to which was to become his research assistant. This was a difficult task, as I had nothing much to commend me, and certainly not in comparison to the intellectual achievements of my classmates.⁷ I did have one advantage, though; I was a decent

⁴ *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15), and *The Queen v. Dudley and Stephens*, L.F. 14 Q.B.D. 273 (1884).

⁵ A point later developed into a book by Nobel prize winner, AMARTYA SEN, *INEQUALITY REEXAMINED* (1992), although I don't recall seeing him in class that day.

⁶ True story, all the way around.

⁷ For example, the first day during orientation, my roommate and I were in some line, talking to everybody else in line, making new friends, and so on. My roommate saw the person ahead of us was reading a rather large book. He tapped the person on the shoulder and inquired, to which the response was “I'm reading Webster's Unabridged. There are some words in the English language that I don't know and I figured while I wait in these lines I may as well pick them up.” And he was

small college tennis player, and (I don't know if Yale knows this) optimized my utilities, one might say, by agreeing to play tennis with his children, who were avid beginners (and actually, and somewhat more, shall we say, "interestingly," playing with Yale and Doug Kahn as well, but that's another story). The ruse worked, I was hired, and so began my career in criminal law and procedure, in a manner of speaking.

This "manner of speaking" eventually blossomed into real work, and again Yale was the person responsible for it. The one constant in my law school career was uncertainty as to what I might do in life. To prolong the uncertainty, I accepted a two-year clerkship with Judge Wallace Kent of the U.S. Sixth Circuit Court of Appeals. Tragically and unexpectedly, he died in the summer of 1973, a week before I was to begin working for him. Yale came to the rescue. That same week he had been contacted by the University of Nebraska College of Law, which for some reason had had an opening come up that needed filling (this was late July, and most unusual). To make a long story short, Yale put us in contact, the faculty extended an offer to teach for a year, I thought it sounded interesting, and the rest is history. In my view, Yale is directly responsible for my interest in the law, and for having gainful employ. I am pleased beyond measure to be able to say thank you to him now.

But there is more. I planned to teach for the year at Nebraska and interview with law firms. I liked what I was doing, interviewed with law schools instead, and got my first permanent appointment at the State University of New York at Buffalo. And soon I had my first introduction to the concept of "tenure." I had to write; I had to produce scholarship; I had to make a contribution to my chosen field. I had to do what? I had no idea what any of this meant. Not a clue. I needed a crash course in what it might mean, and so I read Yale's entire work product⁸ in chronological order, trying to get a sense of how ideas are isolated, treated and developed, how to write effectively, how both might change over time in one person's career, and so on. At every level, from what I thought I was interested in, to the very job that I was fortunate to have, to beginning to think about scholarship and writing, Yale exerted his influence.

Others will have to judge whether his impact was beneficial or baneful, but it was enormous. But for our fortuitous encounters thirty-four years ago, the constant threading of his life through mine, and his never ending willingness to assist in any way he could, my life would have been very, very different. I tell this story as it is the only means I have that comes even close to expressing my debt to him. I am fortunate to be in the midst of a satisfying career, and it is almost literally true that I owe it all to Yale. There are many other former students who could tell a similar story. Perhaps his greatest legacy will be the scores of people whom he inspired and encouraged, and who view him with an affection that

telling the truth. He essentially had a photographic memory and could speed read, ergo . . . I almost dropped out of law school at that moment, fairly confident that I was in the wrong place.

⁸ And that of two other scholars, Wayne LaFave and Anthony Amsterdam.

transcends any disagreements over the law, policy, and even disagreements over whether *Miranda v. Arizona*⁹ should be overruled (which it should)—people who know that his famous gruffness hides a heart of gold.

“All right! Enough of this b.s. What do you mean *Miranda* should be overruled? Why should it be overruled? You guys claim it doesn’t do any good anyway, and only helps those who don’t need it! And if that doesn’t work, you claim that it hamstring the police and lets criminals out on the streets. *Miranda* can’t win! You claim both that it’s ineffectual and ought to be overruled, and it’s effective and ought to be overruled! That’s intellectually unfair. You can’t have it both ways! Which is it?”¹⁰ “Hang on, Yale, let me ex . . .” “And what do you mean that Inbau’s ideas have been in the ascendancy since 1968? Says who? You?!” “Yale, let me ex . . .” “I don’t see it that way at all. The Court hasn’t extended *Miranda*, but it hasn’t significantly cut it back. *Dickerson*¹¹ reaffirmed it. The right to counsel if anything has been strengthened.” “Yale, have you looked at any Fourth Amendment cases lately?” “You said that *Miranda* should be overruled, and that Inbau’s idea are in the ascendancy, implying that the forces were gathering to overrule *Miranda*. If that’s not what you mean, what do you mean?!” “Let me explain!!” “Be my guest! I can’t wait to hear it.”

But before I do, more praise. Whatever one thinks of the current state of criminal procedure in the United States, it bears Kamisar’s imprint. Whether the times make the person, or the person the times, Kamisar was the right person at the right time when he entered teaching in the mid-fifties. He brought a powerful intellect fueled by the fires of indignation over perceived abuses by law enforcement, and he caught a Supreme Court ready and willing to listen. He provided the intellectual content; the Court provided the procedural revolution. It was almost like an assembly line. Kamisar would write an article; the Supreme Court would decide a case more or less adopting his approach and citing to his work. Some examples:

- In 1961, Yale argued, against all the extant law, that even a voluntary statement should be thrown out if preceded by an illegal arrest. Two years later, *Wong Sun* comes down, citing to Kamisar’s work.¹²

⁹ 384 U.S. 436 (1966).

¹⁰ It is not clear what is generating the most unfair, or at least most curious, arguments these days. In an effort to get *Miranda* overruled, its critics are arguing for its effectiveness. Its supporters are arguing that it is largely irrelevant. For a discussion, see RONALD J. ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 749–50 (2001).

¹¹ *Dickerson v. United States*, 530 U.S. 428 (2000).

¹² *Wong Sun v. United States*, 371 U.S. 471, 485 n.11 (1962) (citing Yale Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, 1961 U. ILL. L. F. 78, 84–96).

- In 1962, he wrote on the significance of the right to counsel, and the next year *Gideon v. Wainwright*¹³ was decided.
- He wrote on the illogic of the “silver platter” doctrine, and it was soon discarded.¹⁴
- In 1965, he wrote his masterpiece, in my opinion, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, and of course, the next year saw *Miranda v. Arizona*.¹⁵

He has possibly had more books and articles cited by the Supreme Court than any other living author, and maybe by any author alive or dead, by one count nineteen articles and four books together cited some thirty-three times.¹⁶ The number of his citations by the Supreme Court alone exceeds the number of citations by all courts of the work of all but a handful of scholars.¹⁷

Like Leonardo da Vinci, Kamisar not only created contemporary masterpieces; he anticipated problems that would not become pressing for decades. Two striking examples come to mind. In 1960, he analyzed wiretapping before it became the household word it is today, and before its threat to privacy was widely perceived.¹⁸ In what is perhaps the most remarkable coming out party of all time, the very first article he ever wrote (in 1958 on euthanasia) became his most famous, and set the parameters of a debate that still rages today.¹⁹ It has been reprinted in at least ten different books.

¹³ 372 U.S. 335, 338 n.2 (1963) (citing Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on “The Most Pervasive Right” of an Accused*, 30 U. CHI. L. REV. 1 (1962)); see also Yale Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219 (1962).

¹⁴ *Elkins v. United States*, 364 U.S. 208, 208 n.2 (1960) (citing Yale Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083 (1959)).

¹⁵ 384 U.S. 436, 442 n.2, 473 n.41, 511 (1966) (citing Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, From Escobedo to . . .*, in *CRIMINAL JUSTICE IN OUR TIME 1* (A.E. Dick Howard ed., 1965)); *id.* at 473 n.41 (citing Yale Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219 (1962)).

¹⁶ *You Have the Right to Remain Silent: An Interview with Yale Kamisar*, 46.3–47.1 LAW QUADRANGLE NOTES 22 (2004).

¹⁷ Ronald J. Allen & Ross M. Rosenberg, *Legal Phenomena, Knowledge and Theory: A Cautionary Tale of Hedgehogs and Foxes*, 77 CHI.-KENT L. REV. 683, 690–91 (2002).

¹⁸ Yale Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor’s View*, 44 MINN. L. REV. 891 (1960).

¹⁹ See *Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261 (1990); Yale Kamisar, *Some Non-Religious Views Against Proposed “Mercy-Killing” Legislation*, 42 MINN. L. REV. 969 (1958). I have a personal story to tell about it as well. One of the classes I taught my first year at Nebraska was criminal law, and I used Prof. Kamisar’s materials. Shortly after the cannibalism cases came an

Impact is thus not the question. The interesting question is its nature. Some things are clear. Kamisar's impact was remarkable, but in an even more remarkably compressed period of time, at least on the law. When he wrote his first article on criminal procedure in 1959,²⁰ the forces of what would become the procedural revolution were just gathering steam.²¹ From the late fifties through the late sixties, the field of criminal procedure was transformed,²² but the revolution came to a dramatic end in 1968 with the Supreme Court's opinion in *Terry v. Ohio*,²³ upholding stops and frisks.

There are two reasons for the abrupt conclusion. First, during the late fifties and sixties the Supreme Court was operating in the heady days when it appeared not just the criminal process but the human condition could be transformed. President Johnson announced the Great Society and war on poverty.²⁴ Unrest on the university campuses eventually forced the United States out of Vietnam and transformed politics in many ways.²⁵ The civil rights movement was reaching its zenith, culminating in the 1964 Civil Rights Act²⁶ and the 1965 Voting Rights Act.²⁷ Nothing was beyond the reach of the reforming zeal of this great wave of change that was transforming the American way of life.

examination of mercy killing and the challenges it poses to the law. Preparing for the next day's class discussion, I began reading Kamisar's article late one evening when an electrical storm hit Lincoln. This was early in the semester; I was in unfamiliar surroundings late at night reading about all the strange ways people justify killing each other (and actually do it), and all the lights went out. This seemed like a completely spooky sign to me, but I wasn't sure of what. In any event, I was so captivated by the article, notwithstanding the ambiguity about nature's message, that I found a flashlight, and read the article until the early morning hours by its light.

²⁰ See Kamisar, *supra* note 14.

²¹ Some have attributed the beginning of the modern age of criminal procedure to *Powell v. Alabama*, 287 U.S. 45 (1932). Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L. F. 518, 521. That the forces that would drive the procedural revolution were in place was not obvious until the decisions on habeas such as *Waley v. Johnson*, 316 U.S. 101 (1942), and even more so *Brown v. Allen*, 344 U.S. 443 (1953), and of course became crystal clear in 1961 with the decision in *Mapp v. Ohio*, 367 U.S. 643 (1961).

²² See *Miranda v. Arizona*, 384 U.S. 436 (1966); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Massiah v. United States*, 377 U.S. 201 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

²³ 392 U.S. 1 (1968).

²⁴ 2 SAMUEL ELIOT MORRISON ET AL., *THE GROWTH OF THE AMERICAN REPUBLIC* 768 (7th ed. 1980).

²⁵ *Id.* at 796–97. For a general discussion, see JULES WITCOVER, *THE YEAR THE DREAM DIED: REVISITING 1968 IN AMERICA* (1997).

²⁶ Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 ADMIN. L.J. AM. U. 59, 61 (1993). "The Brown decision prompted an era of civil rights activism, which culminated in the Civil Rights Act of 1964 [FN6 42 U.S.C. sections 2000a–2000h-6 (1988)], the Voting Rights Act of 1965 [FN7 *Id.*, sections 1971–1974e.], and the Fair Housing Act of 1968 [FN8 *Id.*, sections 3601–3619, 3631 as amended by Pub. L. No. 100-430, 102 Stat. 1619 (1988)]." *Id.*

²⁷ *Id.*

Except that many Americans on reflection weren't so sure. Nixon ran and won on a law and order theme.²⁸ The democratic majorities in both houses of Congress began to shrink.²⁹ Both Warren and Douglas faced realistic threats of impeachment.³⁰ Much of America was repelled by the licentiousness on the country's campuses and shocked by the casual rejection of what to much of the country were basic standards of civility, decorum, and morality. Not surprisingly, the Court read the newspapers, watched the election returns,³¹ and brought the procedural revolution to an end in *Terry v. Ohio*.³²

These cultural and political forces were durable. They were hardly perturbed by Nixon's scandals. Following the brief interlude of the ineffectual Jimmy Carter came the Reagan Revolution, by comparison to which the procedural revolution of the Supreme Court faded into insignificance. The landscape of American politics had substantially rejected the perceived excesses of the sixties, and this spilled over into the criminal process. In particular, as Inbau had argued, the importance of factually accurate proceedings, which is really what the importance of guilt is all about, became a dominant concern.³³ The right to counsel advances factual accuracy, and thus the Court has not retreated in any significant way from its Sixth Amendment decisions. By contrast, the substantive contours of the Fourth Amendment and the scope of the exclusionary rules were curtailed significantly.³⁴

²⁸ WITCOVER, *supra* note 25, at 362–63, 437.

²⁹ *Id.* at 444.

³⁰ Warren faced the most realistic threat of impeachment in the years following *Brown v. Board of Education*, 347 U.S. 483 (1954), though the threat receded somewhat. Nonetheless, there was popular discontent with the direction of the Court notably evident in the Douglas impeachment proceedings initiated by then-Congressman Gerald Ford. See Steven W. Fitschen, *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny*, 10 REGENT U. L. REV. 111, 123, 142 (1998).

³¹ “[N]o matter whether th’ Constitution follows th’ flag or not, th’ Supreme Court follows th’ election returns.” FINLEY PETER DUNNE, MR. DOOLEY AT HIS BEST 77 (Elmer Ellis ed., 1938). Rehnquist provides the modern version: “We read newspapers and magazines, we watch news on television, we talk to our friends about current events.” WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 98 (1987).

³² William J. Stuntz attributes the changing course of Supreme Court decisions to changing crime rates, which were rising in the sixties. William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2150–60 (2002). He further thinks he detects a liberalizing trend beginning in the late 1990s, as crime rates plummeted. Fourth Amendment decisions since he wrote two years ago may not be entirely consistent with this. See, e.g., *Illinois v. Lidster*, 540 U.S. 419 (2004). Nonetheless, he is surely right that such matters matter. Equally surely, they are in a dependent relationship with the demands of the population and election returns.

³³ For a discussion, see Ronald J. Allen, *Procedural Due Process of Law, Criminal*, in ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 395 (Leonard W. Levy ed. Supp. 1990).

³⁴ Ironically, in my view. Most of the arguments about the Fourth Amendment exclusionary rule over the last half-century focus on alternative means of enforcing the amendment's substantive requirements. No matter how enforced, if effective, the police will not be in possession of the very evidence the exclusionary rule suppresses. That those other means failed is an argument against them, not against the exclusionary rule.

Miranda came under increasing pressure, but its deleterious effects were less clear. *Miranda* should have resulted in the virtual elimination of confessions apart from plea bargaining, but it didn't. Its impact on accurate adjudication being less, perhaps the Court was less concerned to eviscerate it, and what followed were limiting rulings and refusals to extend its logic. In general during this period, dramatic overrulings were not the order of the day, but it soon became crystal clear that the high water mark of the procedural revolution had been reached, and the waters were receding. No one could stand against these forces. Not even a prodigious and effective scholar of Kamisar's stature.

In particular, a prodigious and effective scholar pursuing the effort as Kamisar and others did, and here is the second reason for the turn away from the procedural revolution. Much of the scholarship of the sixties, of which Kamisar's is perhaps the best, suffered from what in retrospect was a self-inflicted wound: It was long on criticism but short on useful solutions. Kamisar's critique of Inbau, ironically, captures this perfectly. It purports to be an examination of the limits of the significance of guilt to the criminal process, but against what is this idea tested? Nothing but the abstraction of equality.

Let me particularize this to confessions. Inbau's point long had been, as Kamisar makes clear, that an interrogation was proper that was not obtained through physical violence or its threat, and did not overbear the will of the suspect; "overbearing the will" in turn was best defined by tactics that might lead an innocent person to confess. In addition to having obvious common sense appeal, this idea had testable consequences in the relationships between what the cops do, what suspects say, and what independent investigations turn up. As vociferous in his criticisms of the meddling of the Supreme Court as Inbau was, he was just as pointed and persistent in his criticism of the police for engaging in practices beyond the pale because they risked generating false confessions. Pursuing Inbau's idea, in short, had the possibility of optimizing our interests in protecting the innocent and convicting the guilty, and pointed the way to learning the consequences of what we were doing.

Kamisar's primary objection to Inbau's approach is the disparate treatment given to suspects in the Mansions of the courthouse to that given to them in the Gatehouses of the police precincts, coupled with the assertion that the voluntariness test was inadequate to align the two. In the Mansions, the suspect is treated with great deference and accorded substantial rights, like the right to remain silent and to counsel; in the Gatehouses, he is subjected to pressures designed to get from him the truth, and his formal rights, to say the least, are not the first priority. Solving the crime is. His only real protection is that he cannot be compelled to incriminate himself, and that any statement must be "voluntarily" made. Why is this in the least objectionable? Because, Kamisar implicitly answers, of the demands of equality; that, in fact, is the whole point of the Mansions and Gatehouses metaphor.

In a brilliant stroke, Kamisar coupled the rhetoric of equality with the rhetoric of poverty that was so salient in those times. It was not simply the difference

between the Gatehouses and Mansions, but between the rich, aware of their rights and able to enforce them, and the poor, ignorant and vulnerable for whom the voluntariness test was chimerical. The poor as much as the wealthy deserved their legal rights respected; indeed, in our society the provision of legal rights is perhaps the most fundamental demand of government, more important than education, or even life giving water itself. According to Kamisar:

“[B]asic legal services are not of the same order, in our theory of government, as basic medical services,” to say nothing of free tuition at a state university, or free use of water from a municipal corporation. “The provision of applied justice is an essential function of the state even under the most conservative political theory.”³⁵

And he was serious:

If a defendant is rich enough to afford counsel or sophisticated or hardened enough to know his rights and to assert them, I take it we are willing to sacrifice probative, trustworthy evidence in order to ensure the “dignity” or “privacy” of the individual. Why are these values less paramount and “the truth” more important when the fate of poor and ignorant defendants is at stake? To the extent that the Constitution permits the wealthy and the educated to “defeat justice,” if you will, *why shouldn't* all defendants be given a like opportunity?³⁶

So, there it is. Counsel—or something—for indigent or ignorant suspects is more basic than education, medical care, and even food and water, so that they have the same chance to avoid the consequences of their actions as do their wealthier and better informed fellow citizens.

This is equality writ large in inflammatory strokes, and here we see the beginnings of the self-inflicted wound: Metaphors aren't arguments, at least not very good ones, and neither is equality standing alone. More pointedly, as Kamisar's class itself demonstrated vividly, demands of equality require substantive content. Why should these different situations involve similar treatment? Is it really plausible that the Constitution demands that the government meticulously distribute the possibility of miscarriages of justice equally among all segments of society, and that this is a more basic demand than health, welfare, and education? Shouldn't we be trying to reduce the total amount of injustice rather than increasing it merely to satisfy the abstraction of equality? Does the failure to

³⁵ Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, From Escobedo to . . .*, in CRIMINAL JUSTICE IN OUR TIME 1, 74–75 (A.E. Dick Howard ed., 1965) (quoting Betram F. Wilcox & Edward J. Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL L.Q. 1, 16 (1957)).

³⁶ *Id.* at 79–80.

obliterate class distinctions really constitute discrimination? Doesn't recourse to history—a very useful interpretive device with respect to constitutional questions—strongly suggest that the Fifth Amendment is limited to formal judicial proceedings? No, says Kamisar magisterially, the tangled and confused history of the Fifth Amendment “liberates” our judgment.³⁷ In the absence of the constraints of history, we are “liberated” to do the right thing, and that is to bring the practices in the Gatehouses and Mansions into line.

But that would be absurd. It would require the importation of the judicial apparatus into the stationhouse, and more realistically simply result in the elimination of confessions, as all counseled suspects would, as they should from their point of view, refuse to answer any questions. The result would be to convert the protection from overbearing tactics into the practical denial of the capacity to consent to make a statement, the conversion of the right not to be compelled to incriminate oneself into a right never to incriminate oneself. Had the Court done anything like this, those impeachment threats would have become even more realistic. Thus it didn't; it instead fashioned *Miranda*, a decision that Professor Kamisar has spent a good portion of his career defending,³⁸ and imported to the stationhouse a warnings and waiver regime rather than a trial.

Let's now review the bidding. The substantive problem with the voluntariness test, as vividly dissected by Kamisar's use of *Ashcraft v. Tennessee*,³⁹ is its ambiguity. How can one say *Ashcraft* did not have his will overborne after thirty-six hours of interrogation? If even that kind of treatment can generate disagreement about whether an ensuing confession is voluntary,⁴⁰ then the voluntariness test provides no real limits, no comprehensible guidance. Rather than perpetuate the vagaries of such an incomprehensible test, the solution is to give a person subjected to the “inherently compelling atmosphere of the jailhouse” a fighting chance equivalent to that of his wealthier and better informed neighbor by at least warning him of what is going on and that he can have assistance in the form of counsel if desired.

But if we have no means of determining what does or does not overbear the will, how can we know that giving warnings and obtaining a waiver suffice to stop this very same will from being overborne? More problematic still, if the atmosphere of the jail house is so compelling, if it is powerful enough to overbear the will to compel confessions to serious felonies, including capital crimes, and

³⁷ *Id.* at 30.

³⁸ See, e.g., Yale Kamisar, *Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson*, 33 ARIZ. ST. L.J. 387 (2001); *Can (Did) Congress “Overrule” Miranda?*, 85 CORNELL L. REV. 883 (2000); *A Dissent from the Miranda Dissents: Some Comments on the “New” Fifth Amendment and the Old “Voluntariness” Test*, 65 MICH. L. REV. 59 (1966).

³⁹ Kamisar, *supra* note 35, at 30; *Ashcraft v. Tennessee*, 322 U.S. 143 (1944).

⁴⁰ Justice Jackson, dissenting, did not think the confession involuntary. *Ashcraft*, 322 U.S. at 156–74.

even to do so to innocent people, why won't it compel waivers of the abstract legal rights contained in the *Miranda* warnings?⁴¹ Such psychological forces are powerful, indeed, which raises the next problem: If the jailhouse is so inherently compelling, why aren't the wealthy and educated "compelled" to waive and then confess at about the same rate as the poor and ignorant, thus satisfying Kamisar's demand for equality? Without answers to these questions, defenses of *Miranda*, no matter how skillful or ingenious, will ring hollow, and no answers have been forthcoming.⁴²

Kamisar, I think, saw these questions—all of them; but he did not answer them. He edged up to but in the end avoided them. His discussion is worth quoting in full:⁴³

Supplementing the present warnings might help some, but can any set of warnings help enough? If, as *Miranda* assumes with good reason, "a once-stated warning [that a suspect has a right to remain silent], delivered by those who will conduct the interrogation, cannot itself suffice" to guarantee that "the individual's right to choose between silence and speech remains unfettered throughout the interrogation process,"⁴⁴ it is not readily apparent why a "once-stated warning" that a suspect has a right to remain silent and a right to the presence of counsel is supposed to suffice. It is unclear why this or any other series of warning cannot also "be swiftly overcome by the secret interrogation process."⁴⁵ For, "if a choice made with respect to the question of whether or not to cooperate with the police cannot be voluntary if one is confronted with it by the police without the guidance of counsel, how can the choice to dispense with counsel be voluntary in the same circumstances? And won't it be precisely the persons who are most

⁴¹ Kamisar has never, to my knowledge, strongly emphasized the possibility of false confessions: "I share the view that not many *innocent* men (at least those of average intelligence and educational background) are likely to succumb to" objectionable interrogation techniques. Rather, his concern on this score is more "how many *innocent* men are likely to be *subjected* to these methods?" Yale Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 732 (1963).

⁴² Because they cannot be fashioned without resolving the free will/determinism problem, as I am about to delve into in the text.

⁴³ Yale Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15, 36–37 (1974). As the title suggests, Kamisar is paying homage to a truly remarkable article, Paul Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932).

⁴⁴ Kamisar, *supra* note 43, at 36–37. (quoting *Miranda*, 384 U.S. at 469).

⁴⁵ *Id.* (quoting *Miranda*, 384 U.S. at 470, which in turn is quoting from the Brief for the Nat'l Dist. Attorneys Assn. as *amicus curiae*: "Prosecutors themselves claim that the admonishment of the right to remain silent without more 'will benefit only the recidivist and the professional.' . . . Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process.").

likely to be ‘compelled’ to cooperate by the subtle coercion of custody who will be ‘compelled’ by the same subtle coercion to waive the right to counsel itself?”⁴⁶

Police-issued warnings may mitigate—but cannot be expected to dispel fully—“the compulsion inherent in custodial surroundings,”⁴⁷ certainly not when, as apparently is often the case, such warnings are delivered in a tone and manner that geld them of much of their meaning or are accompanied by “hedging” that undermines their purpose.⁴⁸ Thus, borrowing language from *Miranda*, one may forcefully contend that “As a practical matter, the compulsion to speak in the isolated setting of a police station,” even when supposedly offset by warnings, may still be “greater than in courts or other official investigations”—or at a judicially supervised interrogation—where there are “impartial observers to guard against intimidation or trickery.”⁴⁹

Kamisar saw that the very same forces operating to coerce confessions should, if his and the Court’s theory is correct, coerce waiver, but why doesn’t that make hash of the theory? There is no answer, except the suggestion that perhaps the *Miranda* warnings might do some good—“Police issued warnings may mitigate”—but how could that be true, if the “inherently coercive atmosphere of the jailhouse” can compel people to confess to capital crimes? Surely there is a margin here, but equally surely the mild palliative of warnings would be washed out by the strength of the coercive atmosphere hypothesized here in all but the extraordinary case, and probably just simply in all cases. And if internal inconsistency is not enough, how do we know what exactly the psychological pressure is that is the critical component at stake and what exactly motivates what? Largely absent from the *Miranda* debate is the striking point that, in fact, it is completely dependent upon the psychology of decision making, and there is nary a cite to any such work.⁵⁰ It is all *a priori* reasoning. It will thus “convince” only those already converted.

If even that is not enough, remember that the psychology of decision making has to distinguish between “free will” and “compelled” statements. Not only must we have insight into human decision making, but that insight must resolve the free

⁴⁶ *Id.* (quoting MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Commentary at 40 (Study Draft No. 1, 1968)).

⁴⁷ *Id.* (quoting *Miranda*, 384 U.S. at 458. “Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.”).

⁴⁸ *Id.* (quoting *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1551–52, 1571–72, 1614–15 (1967)).

⁴⁹ *Id.* (quoting *Miranda*, 384 U.S. at 461).

⁵⁰ But see Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979) (addressing the issue).

will/determinism debate and provide an algorithm for distinguishing the one from the other, which is not going to happen any time soon. This is the deepest and most pervasive black hole around which the arguments defending *Miranda* revolve, typically without acknowledging its gravitational pull,⁵¹ and why Inbau to his credit saw that the critical problem was not unknowable states of fictional entities but instead whether police tactics are abusive or likely to make an innocent person give a false confession. Kamisar, by contrast, simply engages in *a priori* reasoning about what states of affairs are likely to subject a suspect to more or less pressure, be more or less “compelling,” but what difference does that make?⁵² Unless the Fifth Amendment means a confession is valid only if the suspect is literally feeling no pressure, relative measures are irrelevant. What is needed is an absolute standard. And if the Fifth Amendment does mean that the suspect can be feeling no pressure, only the insane can confess.⁵³

⁵¹ Even Grano, *supra* note 50, who sees and begins to discuss the problem ends up taking a detour. After noticing the philosophical problem, he asserts that “a concern for mental freedom must play a role in the law of confessions. This conclusion, however, requires acceptance of neither the free will postulate, which assumes a contra-causal freedom of choice, nor the notion that an individual’s confession is involuntary when ‘his will has been overborne.’ Instead, the mental freedom inquiry requires us to make normative judgments about various degrees of impairment of mental freedom.” *Id.* at 865–66.

I am a deep admirer of Prof. Grano’s work, but this pushes the inquiry in the wrong direction. A concern for “mental freedom” does require that it exist, and ontologically the concept only makes sense if there is free will (which is what Grano means by “contra-causal freedom of choice”). Without free will, there are not degrees of mental freedom. There can certainly be rules and guidelines about the sort of pressure that can be brought to bear on a suspect, as Grano goes on to develop, and it may be useful and plausible to think of that pressure in terms of “more” or “less,” but it is not plausible to think of that pressure as “more or less” impairing mental freedom unless it exists. Freedom from one particular constraint merely leaves a determined mind determined by something else. If mental freedom/free will does exist, then the law ought to be addressing whether it has been compromised, which is exactly the question Grano asserts need not be answered. One can say, of course, that even if free will exists we have no measure of it, and thus will have to make do with standards created along the lines Grano suggests. What informs those standards are precisely the concerns of Inbau, to-wit to eliminate what society at large would view as impermissibly harsh (physical or mental) or would create an unacceptably high probability of an innocent person confessing. Free will comes in an all or nothing package, although what we do to people does not.

⁵² In the one extended treatment of the free will problem in Kamisar’s writing of which I am aware, he merely assumes that free will exists, or as he says, although most people confess for a reason, “in another sense, *all* criminal confessions are ‘voluntary,’” that sense being that individuals always have a choice. Kamisar, *supra* note 41, at 747. I am not sure how he knows that, and frankly I think he is wrong. If he is right, then it is mysterious how he can also coherently suggest that different situations can “become increasingly less ‘voluntary.’” *Id.* at 750. Again, if it exists, free will is attached to an on/off switch, not a dimmer. In any event, my main point here is that the failure of the *Miranda* debate to attend adequately to its true philosophical underpinnings has not been helpful.

⁵³ See, e.g., *Colorado v. Connelly*, 479 U.S. 157 (1986). Moreover, to the extent that Kamisar’s concern is that innocent people may be subjected to tough questioning, see Kamisar, *supra* note 41, obviously a warning and waiver regime will inhibit that only if individuals can effectively exercise their rights. If the innocent are “coerced” into waivers by the “inherently compelling atmosphere of the jailhouse,” the *Miranda* regime is completely unresponsive to the problem.

Now let's really review the bidding. Inbau posed a straightforward, commonsensical, and plausible idea that had the additional virtue of containing verifiable propositions (like the effect of different interrogation techniques). This was opposed by some of the most powerful and effective advocacy that has ever been generated, but that substantively was considerably less compelling. It failed adequately to address that the very same criticism about the nature of free will that was its central criticism of the voluntariness test applied equally well to itself. It failed to answer why it was even remotely plausible that the adjustments of *Miranda* would realign the competing forces in a way to advance whatever constitutional interest there may be in the exercise of free will. It failed to confront that it reduces to simply asserting that there were too many confessions, and thus failed to articulate how many there should be, or why this particular approach (or any other) would optimize the number and their distribution. It invoked classical liberal fury at class distinctions,⁵⁴ but in the cold light of day how compelling is it that more wrongful acquittals or discharges to equalize the treatment of the educated and the ignorant is better than minimizing the total number of mistakes?⁵⁵

In retrospect, this was a clash between a straightforward, compelling idea grounded in reality opposed by dazzling intellectual fireworks of the sort never seen before, but whose illumination failed to reach the real challenge posed by that straight forward idea. It is a credit to the power of Kamisar's advocacy that he drove Inbau's idea into the ground, almost literally. Kamisar won the Supreme Court and the legal academy. It is a credit to the power of Inbau's idea that the victory was short lived, that the counter assault soon began, and even though

⁵⁴ William Stuntz points out that plausibly *Miranda*'s effects are quite perverse, increasing the probability of innocent individuals being convicted. The argument is that prosecutors will substitute away from guilty individuals with *Miranda* claims, but the set from which they substitute will be drawn—those with no *Miranda* claims—are, on average, more likely to be innocent (because those with a *Miranda* claim are more likely to be guilty than a person lacking one). William Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975 (2001). Such a discrimination seems more problematic, even if not "invidious" within the meaning of the law, than one based on poverty alone that does not implicate the probability of guilt. But *Miranda* may discriminate on the basis of poverty, too. Stuntz argues that the types of individuals likely to invoke their *Miranda* rights are the sophisticated (wealthy) and the hardened (recidivist); the ones unlikely to invoke their rights are the unsophisticated (uneducated) and vulnerable (poor). The very discrimination so troubling to Kamisar may simply be replicated in the wake of *Miranda*.

⁵⁵ Even more problematic, the argument goes on and on under the seductive attraction of equality. Wealth is probably more of a discriminator at trial than in the stationhouse. Does that mean that the government can try no one unless it gives the best defense counsel and unlimited financial support to everyone? The argument also neglects, as no satisfactory argument from equality can, that there is always more than one way to eliminate inequality. For example, not allowing the right to counsel to anyone pre-trial (or pre-indictment, or pre-whatever you like), and allowing the police a reasonable chance to interrogate everyone, solves Kamisar's problem. The lesson here is precisely the lesson of the second week of Kamisar's criminal law class that equality is a trickier concept than it appears at first glance. Kamisar gestured in this direction his tribute to Paul Kauper, *Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15 (1974), but has never followed the argument to its conclusion.

Miranda remains on the books, it has been constricted both in theory and overwhelmingly in practice.

Kamisar was once called "the most overpowering criminal law scholar in the U.S.,"⁵⁶ and I believe this is accurate. Reading his work leaves one astonished by the breadth of his knowledge and even more by the diligence of his research. He seems to know everything, and to every idea he attaches a quote, or better yet two or three. Perhaps the only thing that matches the breadth of his knowledge and the intensity of his effort⁵⁷ is the depth of his commitment to eliminating what he perceives as abuses of authority.⁵⁸ His career harnessed scholarly prodigiousness to

⁵⁶ *Gifted Gadfly*, TIME, Nov. 11, 1966, at 77, 79.

⁵⁷ I have never, ever, known anyone as dedicated or who works as hard as Kamisar. Another more or less true story. He was working on some important article, and I was doing standard research assistant things. Like Ashcraft's interrogators, I got tired and went to get some sleep. I returned early the next morning, to find Kamisar, who had worked through the night trying to get the manuscript just right, obviously agitated. "Where have you been?!" "Well, I, uh . . ." "I've been trying to look up this word in the dictionary and I can't find it. I need to know how to spell it! Find it." And he threw the Detroit phonebook at me, where, not terribly surprisingly, he had had some difficulty finding his word. As I think of it, Kamisar had been working about the same amount of time Ashcraft had been interrogated. I leave others to judge what inferences one should draw from the comparison.

⁵⁸ Again, though, I think Inbau had the better of it. Abusive governmental authority can be levied on people directly, such as through coercive interrogations, or indirectly through the failure to maintain peace, order, and lawfulness on the streets. Inbau saw clearly, and Kamisar never adequately addressed, that both are problems. For all of Kamisar's "victimizing" of people like Ashcraft there is a remarkable failure to attend to the real victims, such as Ashcraft's wife, whom he almost certainly had killed. Here is the story, from Jackson's dissent:

There are two versions as to what happened during this period of questioning. According to the version of the officers, which was accepted by the court which saw the witnesses, what happened? On Saturday evening Ashcraft was taken to the jail, where he was questioned by Mr. Becker and Mr. Battle. Becker is in the Intelligence Service of the United States Army at the present time and before that was in charge of the Homicide Bureau of the Sheriff's office of Shelby County, Tennessee. Battle has for eight years been an Assistant Attorney General of the County. They began questioning Ashcraft about 7:00 p.m. They recounted various statements of his which had proved untrue. About 11:00 o'clock Ashcraft said he realized the circumstances all pointed to him and that he could not explain the circumstances. They then accused him of the murder, but he denied it. About 3:00 a.m. Becker and Battle retired and left Ashcraft in charge of Ezzell, a special investigator connected with the Attorney General's office. He questioned Ashcraft and discussed the crime with him until about 7:00 on Sunday morning. Becker and Battle then returned and interviewed him intermittently until about noon, when Ezzell returned and remained until about 5:00. Becker then returned, and about 11:00 o'clock Sunday night Ashcraft expressed a desire to talk with Ezzell. Ezzell was sent for and Ashcraft told him he wanted to tell him the truth. He said, "Mr. Ezzell, a Negro killed my wife." Ezzell asked the Negro's name, and Ashcraft said, "Tom Ware." Up to this time Ware had not been suspected, nor had his name been mentioned. Ashcraft explained that he did not tell the officers before because "I was scared; the negro said he would burn my house down if I told the law."

Thereupon Becker, Battle, Ezzell, and Mr. Jayroe, connected with the Sheriff's office, took Ashcraft in a car and found Ware. When questioned at the jail, Ware turned to

Ashcraft and said in substance that he had told Ashcraft when this thing happened that he did not intend to take the entire blame. The officers thereupon turned their attention to Ware. He promptly admitted the killing and said Ashcraft hired him to do it. Waldauer, the court reporter, was called to take down this confession, and completed his transcript at about 5:40 a.m. He read it to Ware and told him he did not have to sign it unless he so chose. Ware made his mark upon it and swore to it before Waldauer as a Notary Public. A copy was given to Ashcraft, and he then admitted that he had hired Ware to kill his wife. He was given breakfast and then in response to questions made a statement which was taken down by the court reporter, Waldauer. It was transcribed, but Ashcraft declined to sign it, saying that he wanted his lawyer to see it before he signed it. No effort was made to compel him to sign the confession. However, two businessmen of Memphis, Mr. Castle, vice president of a bank, and Mr. Pidgeon, president of the Coca-Cola Bottling Company were called in. Both testified that Ashcraft in their presence asserted that the transcript was correct but that he declined to sign it. The officers also called Dr. McQuiston to the jail to make a physical examination of both Ashcraft and Ware. He had practiced medicine in Memphis for twenty-eight years and both Mr. and Mrs. Ashcraft had been his patients for something like five years. In the presence of this friendly doctor Ashcraft might have complained of his treatment and avowed his innocence. The doctor testified, however, that Ashcraft said he had been treated all right, that he made no complaint about his eyes, and that they were not bloodshot. The doctor made a physical examination, and says Ashcraft appeared normal. He further testified as to Ashcraft, "Well, sir, he said he had not been able to get along with his wife for some time; that her health had been bad; that he had offered her a property settlement and that she might go her way and he his way; and he also stated that he offered this colored man, Ware, a sum of money to make away with his wife." [FN1] The doctor says that that statement was entirely voluntary. No matter what pressure had been put on Ashcraft before, the courts below could reasonably believe that he made this statement voluntarily to a man of whom he had no fear and who knew his family relations.

FN1 The officers had been baffled as to any motive for Ashcraft to murder his wife (who was his third, two former ones having been separated from him by divorce). He disclosed in his confession to them that her sickness had resulted in a degree of irritability which had made them incompatible and resulted in his sexual frustration.

Ashcraft's story of torture could only be accepted by disbelieving such credible and unimpeached contradiction. Ashcraft testified that he was refused food, was not allowed to go to the lavatory, and was denied even a drink of water. Other testimony is that on Saturday night he was brought a sandwich and coffee about midnight; that he drank the coffee but refused the sandwich; that on Sunday morning he was given a breakfast and was fed again about noon a plate lunch consisting of meat and vegetables and coffee. Both Waldauer, the Reporter, and Dr. McQuiston testified that they saw breakfast served to Ashcraft the next morning, before the statement taken down by Waldauer. Ashcraft claims he was threatened and that a cigarette was slapped out of his mouth. This is all denied.

Ashcraft, 322 U.S. at 164–67. Ashcraft and Ware were eventually acquitted by a jury that learned of neither confession. Wilfred J. Ritz, *State Criminal Confession Cases: Subsequent Developments in Cases Reversed by U.S. Supreme Court and Some Current Problems*, 19 WASH. & LEE L. REV. 202, 210 n.38 (1962). Standing alone, Ashcraft's probable guilt obviously does not justify the police tactics, but neither should the fortuity of the police reading his rights to him and getting a waiver followed by the same chronology. This dramatically highlights the incompatibility between the problem and its solution in *Miranda*.

intellectual commitments, produced some of most powerful advocacy in the English language, and it came at just the right time. But no matter how powerful the advocacy, its underlying ideas have to bear the test of time—like Inbau's concern about the innocent and guilty has. Here Kamisar's work has not fared as well. It is not enough to criticize; one must provide the alternative and subject it to the same rigorous analysis as your opposition.

In a telling passage in his tribute to Inbau, Kamisar relates how an article of Inbau's made him "furious. Inbau had ripped into the Court I loved and my thinking then was that '[t]o war against the Court was to war against the Constitution itself.'"⁵⁹ But this is plainly wrong (and not just, as Kamisar acknowledged in his tribute to Inbau, that ideas in opposition can further thought⁶⁰). It was not criticism of the Court that was the issue; it was criticism of a narrow set of opinions that themselves could not be justified linguistically, historically, and were wrenching departures from precedent. Over the last thirty years as the Court has brought constitutional decisionmaking back to the center, Kamisar has not only not expressed outrage at contemporary critics of the Court; he has himself criticized it.⁶¹

By contrast, these very same opinions could be "justified" by their consistency with a certain set of values, principles, and beliefs. In the sixties, the Court, with Kamisar cheering them on, "exercise[d] leadership" in a "bold" and "innovative" way,⁶² regardless of constitutional language, historical understandings, or precedent. But if it is appropriate for the Court to impose its conceptions of enlightened policy on the country, it is so regardless whether the majority agrees or disagrees with Professor Kamisar or anyone else, for the appropriateness must lie in the institutional role. The explanation for Kamisar's outrage at Inbau's criticism but considerably more sanguine view of criticism of

Kamisar might respond that for every person like Ashcraft who is probably guilty, perhaps ninety-nine might also be interrogated who are probably innocent. See Kamisar, *supra* note 41, at 732. Putting aside any skepticism of the statistics he invokes or their contemporary relevance, Kamisar's possible response can only begin, not end, the conversation. Suppose he is right. The question now becomes what price society is willing to pay to reduce the probability of people like Ashcraft getting away with their crimes. I agree with Kamisar that subjecting innocent people to the rigors of any part of the criminal process is unfortunate, but it is also inevitable in any system humans can devise. That, too, is not a conversation stopper, however, but simply a reiteration that costs and benefits must be taken into account in all social planning.

⁵⁹ Kamisar, *supra* note 1, at 192 (quoting ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 265 (1962)).

⁶⁰ Kamisar, *supra* note 1, at 196.

⁶¹ See, e.g., Kamisar, *supra* note 43, at 24 n.27 (noting, with remarkable equanimity for someone who wondered whether criticizing the Court may be close to warring on the Constitution, that Alan M. Dershowitz and John Hart Ely "bitterly criticized" the Court in *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971), and in the same footnote also expressing some concern at the direction the Court might go in the future.).

⁶² Kamisar, *supra* note 1, at 196.

the Burger and Rehnquist courts must rest on the extent to which the justices and Professor Kamisar agree on enlightened policy, regardless of constitutional language, historical understandings, or precedent. To the rest of us, however, it is hardly a commendable theory of constitutional interpretation that the Court should do whatever it likes—so long as it agrees with Professor Kamisar, or me, or you. Indeed, one of the delicious ironies of modern academic discourse is the box that the defenders of the Warren Court now find themselves in. Having argued, in essence, that the Court should be “bold” and “innovative,” and generally do the right thing, how can one then turn around and criticize a Court whose majority has shifted away from your beliefs? No one else will accept an argument that the Court should do the right thing, as perceived idiosyncratically by the speaker. Having argued that the Court should be a source of fundamental change according to its own lights, academicians are hard pressed to criticize in an intellectually honest manner whatever policies the present majority favors.⁶³

As is Professor Kamisar, and so now we return one last time to the comparison between Inbau and Kamisar. Inbau was grounded in the realities of the street. He saw first hand the horrors of violent crime, he saw first hand the horrors of the third degree, and he did what he could to reduce both. This is what explains and justifies the importance of being guilty. Kamisar was grounded in the resistance to arbitrary authority. Kamisar saw certain ideals that he wished were enshrined in the Constitution and enforced by the Supreme Court, and he did what he could to bring that about, regardless of the effect on law enforcement. He almost succeeded. He won the Court but lost the country.⁶⁴

Or did he? There is no question that the decisions of the Supreme Court have receded considerably from the high-water mark of the procedural revolution, but so, too, has the criminal process. When the Supreme Court today hands down an opinion permitting some state action without a warrant,⁶⁵ or refusing to throw out a conviction because some technicality of *Miranda* was not slavishly followed,⁶⁶ it does so against a backstop of criminal justice systems that have internalized many of the lessons of the procedural revolution. The problem of racist southern criminal justice systems, while not a thing entirely of the past, has diminished

⁶³ Not surprisingly, some such scholars now see a value to stability, i.e. preserving the work product of the Warren Court, where previously stability was considerably less cherished. See Cass R. Sunstein, *The Supreme Court 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

⁶⁴ Except for the law schools, where Kamisar remains an inspiration to most teachers of criminal procedure. The universities are also, of course, the last bastion of sixties liberalism. The two points go hand in hand.

⁶⁵ See, e.g., *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990).

⁶⁶ See, e.g., *Duckworth v. Eagan*, 492 U.S. 195 (1989). Kamisar would disagree that the “error” in *Duckworth* was a technicality. See Yale Kamisar, *Duckworth v. Eagan: A Little-Noticed Miranda Case That May Cause Much Mischief*, 25 CRIM. L. BULL. 550 (1989).

considerably. Torture by the police is rare.⁶⁷ The system has adapted to many of the requirements of the procedural revolution without devastating effects on law enforcement. Perhaps the final irony is that the two great opponents, Inbau and Kamisar, have finally reached an accommodation. Together they taught us about abuses of authority, whether in the police station or the chambers of the Supreme Court. The country is plainly better for it.

I dare say, however, that neither would be very happy with this rosy assessment. Fred Inbau would look at me with the compassion reserved for those misguided few who couldn't see how perverse *Miranda* is and why it must go no matter what. Kamisar will respond to this essay, I suspect, with his overpowering rhetorical skills that will leave everyone wondering how it is possible that someone of my meager abilities could ever have passed one of his classes (it's a mystery to me, too, actually).

Notwithstanding the blistering assault I fully expect, I know one thing for certain—we are all better off for having Yale Kamisar in our midst. Whether one agrees or disagrees with him, “he furthered, or should have furthered, the thinking of all of us.”⁶⁸ Although his ideas no longer dominate constitutional interpretation, they once did, and again we are better off for it, even though we are also better off that things have taken yet another turn. All of us privileged to call him friend are better off for the privilege of doing so. In my opinion, just like he embodied the spirit of the procedural revolution, he also embodies what it means to be a person of character and integrity. He will grit his teeth when he reads some of what I have written here, and I am fairly certain that we will have a spirited—probably not exactly the right word—conversation or two about it, but, to make matters simple, the next time I need a favor, he'll be there. I doubt he'll admit it, but I suspect deep in his heart he even takes some pride in having played a role in the genesis of my, to him, misguided thinking, that even though I disagree with him on certain critical points my views were formed in significant measure in opposition to his and under his influence. No, I take that back. His pride in his former students, even those who do not toe the party line, will never be hidden in the recesses of his heart; it will be worn on his sleeve for all to see. That's who he is. A man of great intelligence, deep insight, passionate about his beliefs, and the epitome of what it means to be a teacher and a friend.

⁶⁷ But see WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS* 128–35 (2001), for a discussion of torture allegations against the Chicago Police Department and Commander John Burge, commander of the implicated Area Two Violent Crimes Unit.

⁶⁸ Kamisar, *supra* note 1, at 196.